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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE NOVEMBER FIRST  
PARTNERSHIP,

Cross-complainant and  
Appellant,

v.

MOHAMMED ISLAM et al.,

Cross-defendants and  
Respondents.

B280438, B281972

Los Angeles County  
Super. Ct. No. BC532123

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Gregory Alarcon, Judge. Affirmed.

Fox Rothschild, L. Peter Ryan and Jack Praetzellis, for  
Cross-complainant and Appellant.

Law Office of Jeff Katofsky, Jeff Katofsky and Michael Leff  
for Cross-defendants and Respondents Mohammed Islam and  
LMN Property, Inc.

Lloyd K. Chapman; Law Office of Jeff Katofsky,  
Jeff Katofsky and Michael Leff for Cross-defendants and  
Respondents Selamat, LLC and Miraj, LLC.

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The November First Partnership (NFP) filed a cross-complaint alleging tort and contract claims against other members of a limited partnership. After a bench trial, the trial court found a dissolution action filed by one of the defendants breached the partnership agreement but caused no damage, and none of NFP's other claims had merit. After finding the cross-defendants were the prevailing parties, the court ordered NFP to pay more than \$880,000 in costs and attorney fees.

NFP appeals, arguing we must reverse the judgment and the awards of costs and attorney fees, remand to the trial court to award nominal damages, and award costs and fees accordingly. Because NFP forfeited the issue when it failed to raise the issue of nominal damages in the trial court, we affirm the judgment and orders.

### **BACKGROUND**

2404 Wilshire, Ltd., a limited partnership ("the partnership"), owns a commercial building in Los Angeles. The original general partner was a corporation owned equally by Mohammed Islam and Michael Kamen. In 2015, after Kamen's bankruptcy, the general partner with a 10% ownership interest was LMN Property, Inc., which was owned by Miraj, LLC, which in turn was owned by Islam. The limited partners were Selamat, LLC (also owned by Islam), with a 15% interest; 2404 Realty Partners, LP, with a 25% interest; and NFP, with a 50% interest.

While Kamen's bankruptcy proceedings were pending, in January 2014 Islam (as general partner) filed a complaint for

dissolution of the partnership. The first amended complaint for dissolution alleged that Kamen's bankruptcy filing caused a default under the loan on the property, the general partnership was hopelessly deadlocked, and foreclosure was imminent. Islam filed an amendment adding NFP as a Doe defendant in May 2014.

In August 2014, NFP filed a cross-complaint against Islam and LMN Property (hereafter, collectively Islam) for willful breach of fiduciary duty and breach of contract. In a first amended cross-complaint (FACC) filed in October 2014, NFP alleged that Islam engaged in self-dealing when he failed to renegotiate the building's parking lease with another company Islam owned; acted with oppression and malice during buyout discussions; based his dissolution action on a lie; fraudulently reaffirmed the partnership agreement; refused to communicate with other partners (and when he did, made fraudulent statements and acted with oppressive motives); deliberately refused to cure non-monetary defaults of the loan; maliciously denied access to the property; and acted with an oppressive motive. In alleging that Islam's dissolution action was based on a lie ("[t]he alleged 'deadlock' . . . is a fraud on the Court"), NFP added:

"The claim also is expressly prohibited by the Partnership Agreement, as amended. Specifically, pursuant to the Third Amendment, '[f]or so long as any mortgage lien exists on the Property, . . . [t]he Partnership shall not engage in, seek or consent to any dissolution . . . .' [Citation.] A mortgage lien exists on the Property, and therefore, the

Partnership Agreement expressly prohibits dissolution, which is a default under loan agreements.”

NFP included Islam’s filing of the dissolution action as part of the conduct constituting eight breaches of fiduciary duty. The cross-complaint alleged that the same conduct also breached the partnership agreement. NFP alleged it was entitled to prevailing party attorney fees and costs under the partnership agreement. NFP later filed a motion to add a third cause of action for breach of the covenant of good faith and fair dealing.

Islam dismissed the dissolution action on June 22, 2015.

In March and April 2016, the trial court held a bench trial on the FACC, permitting evidence on NFP’s proposed cause of action for breach of the covenant of good faith and fair dealing. NFP argued it was entitled to nearly \$350,000 in compensatory damages as well as punitive damages and injunctive relief.

The court issued an 11-page final statement of decision on September 23, 2016. The court found NFP had not shown that Islam breached his fiduciary duties by self-dealing related to the parking lease or on any of the numerous other allegations, including by filing the dissolution action, which (as Islam had withdrawn the action) had caused no damage. The court also found against NFP on all its breach of contract claims, except for one claim: “Islam filed for dissolution of [the partnership]. This action, on its face, constitutes a breach of . . . the Partnership Agreement,” and Islam acted as general partner when he filed the dissolution action. The court continued:

“NFP fails to establish a contractual breach because no resulting damage is proven, except for its fees as a result of litigation. While . . .

the Agreement states a prevailing party is entitled to its attorney fees and costs for ‘an action against the other by reason of an alleged breach of contract,’ any claims for contractual attorney fees must be filed by motion, within the time for filing a notice of appeal. [Citations.] Further, to find an award for attorney fees where claims are based on contract, a court must determine the prevailing party by comparing the extent each party succeeded and failed to succeed as to their contentions and relief awarded on their contract claims. [Citation.] This court finds NFP failed to prevail in establishing any credible damage as a result of Islam’s contractual breach.”

The court also found no breach of the covenant of good faith and fair dealing, and no grounds for awarding punitive damages against Islam.

The December 6, 2016 judgment stated that NFP shall take nothing by way of its cross-complaint, and the cross-defendants (Islam) were entitled to costs and fees.

Islam filed a motion for attorney fees and costs as the prevailing party, under Civil Code section 1717, Code of Civil Procedure section 1021, and the attorney fees provision in the partnership agreement. NFP filed a motion to tax cross-defendants’ costs and an opposition to Islam’s motion for attorney fees. NFP argued that under Civil Code section 1717 Islam was not the prevailing party and was not entitled to fees, because Islam did not prevail on all the contract claims. NFP had

prevailed on the contract claim based on Islam's dissolution action, and the overall results therefore were "a mixed bag." Islam voluntarily dismissed the dissolution action, so Civil Code section 1717, subdivision (b)(2) required the court to find there was no prevailing party on the claim. In addition, NFP would easily have defeated Islam's dissolution action, because the partnership agreement prohibited a partner from seeking dissolution. NFP argued that Islam was not the prevailing party and was not entitled to fees, and also argued the fees were unreasonable and excessive. At no point did NFP argue it was entitled to an award of nominal damages on its claim that the dissolution action breached the partnership agreement.

On February 27, 2017, the trial court awarded \$823,271.88 in attorney fees to Islam and against NFP. On March 15, 2017, the trial court granted in part NFP's motion to tax costs, and awarded Islam \$13,801.58 in costs. On April 10, 2017, the trial court awarded an additional \$43,972.50 in fees to Islam and against NFP.

NFP filed notices of appeal from the judgment and from the attorney fees and costs awards. We consolidated the two appeals for argument and decision.

### **DISCUSSION**

The trial court found that Islam breached the partnership agreement by filing the dissolution action, but NFP did not show that the breach caused it any damage, and therefore NFP was not the prevailing party on that contract claim. NFP argues the trial court should have awarded it nominal damages for Islam's breach of contract, and as such an award would "carry costs" (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406), the judgment must be reversed and remanded to the trial court.

NFP contends that once the trial court has awarded nominal damages on remand, it must award costs to NFP as the prevailing party with a net monetary recovery, and must also exercise its discretion anew to determine the prevailing party entitled to attorney fees under Civil Code section 1717.

When, as in this case, a litigant cannot identify a loss or injury to be compensated but has proven a technical breach of a defendant's duty (here, the duty not to file a dissolution action), nominal damages, limited to a few cents or a dollar, may be awarded: "[T]he defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages." (*Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632; *Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1088-1089.) Nominal damages are " 'symbolic' " redress for intangible harm rather than for actual, compensable injury. (*Belle Terre Ranch, Inc. v. Wilson* (2015) 232 Cal.App.4th 1468, 1476.)

NFP never requested or even mentioned nominal damages in its pleadings, at trial, in its objections to the proposed statement of decision, in its motion to tax costs, in its reply to Islam's opposition to the motion, or in its opposition to Islam's motion for attorney fees. NFP has forfeited its argument that the trial court erred when it did not award nominal damages.

NFP argues it has not forfeited the issue on appeal because the court's failure to award nominal damages is a legal error on the face of the statement of decision. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1067.) But Civil Code section 3360 merely *permits* a trial court to award nominal damages: "When a breach of duty has caused no appreciable detriment to the party affected, he *may* yet recover nominal damages." (Italics added.) The trial court therefore may award nominal damages but need not do so.

(*Staples v. Hoefke, supra*, 189 Cal.App.3d at p. 1406.) NFP never sought nominal damages, the trial court was not required to award them, and no legal error occurred when the court did not include nominal damages in the judgment.

We will not reverse and remand to the trial court on an issue it was not required to address and that NFP never raised. We therefore affirm the judgment, the order awarding costs, and the orders awarding attorney fees.

#### **DISPOSITION**

The judgment and orders are affirmed. Costs are awarded to Mohammed Islam, LMN Property, Inc., Selamat, LLC, and Miraj, LLC.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.